THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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May 26, 1977

The Honorable John Wilson
Chairman
Committee on Health and Welfare
Texas House of Representatives
Austin, Texas 78769

Letter Advisory No.- 145

Re: Constitutionality of House Bill 1875, relating to abortions.

Dear Chairman Wilson:

You have requested our opinion concerning the constitutionality of House Bill 1875. The bill provides for criminal penalties for the performance of "abortional acts" in certain circumstances. It further establishes procedures for abortions taking place after the 20th week of gestation, conditionally prohibits the use of saline amniocentesis, and provides certain reporting requirements. The various prohibited acts are classified as felonies and carry maximum penalties of as little as ten years imprisonment to as much as life imprisonment.

As we noted in Attorney General Opinion H-369 (1974), the United States Supreme Court developed the following guidelines in Roe v. Wade, 410 U.S. 113, 114 (1973).

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

> (c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Sections 5 and 6 of House Bill 1875 provide that "a person commits an offense if he commits an abortional act upon a woman, unless that act is an abortional act specified in [section 3 of the bill]." Sec. 6(a).

Section 3 provides in part:

> (c) A person does not violate Subsection (a), Section 19.02, of this code if that person performs an abortional act
>
> (1) upon a woman carrying an unborn child who is viable when that person is a duly licensed physician who, after a pregnancy test indicating she is pregnant, performs an abortional act upon her on the basis of the best medical judgment of a physician that that act is necessary to prevent the death of the woman or viable unborn child or a grave impairment of the health of the woman and the medical practice used is one which, in the best medical judgment of that physician, will give the unborn child the best chance of survival unless the necessity for preventing the death or grave impairment of the health of the woman prevents its use.
>
> (2) upon a woman carrying an unborn child who is not viable when that person is a duly licensed physician, who, after a pregnancy test indicating she is pregnant, performs an abortional act upon her on the basis of the best medical judgment of a physician that that act is necessary under all attendant circumstances.

Section 2 provides in part:

> (37) "Unborn child" means an unborn offspring of human beings from the time of its conception throughout pregnancy.
>
> (38) "Viable unborn child" means an unborn child who possesses the capacity to live outside its mother's womb upon its premature birth, whether resulting from natural causes, an abortional act, or otherwise, and whether that capacity exists in part due to the provision or availability of natural or artificial life-supportive systems. The legislature finds and declares that an unborn child is viable at the gestational age of 22 weeks because there is substantial evidence that such a child has a substantial chance to survive with the aid of services of a well-equipped pediatric service; however, the State Board of Health Resources is empowered to and shall establish by regulation an earlier age at which an unborn child becomes a viable unborn child for the purposes of this definition if it determines, after investigation, that an unborn child is, in fact, viable at that earlier age.
>
> (39) "Abortional act" means an act committed upon or with respect to a woman, whether she is pregnant or not, whether directly upon her body through use of an instrument or other thing whatsoever, or by administering, taking, or prescription of drugs or any substance whatsoever, or by any other means, with intent to cause the death of an unborn child or the expulsion or removal of an unborn child from the womb of the woman other than for the principal purpose of removing a dead fetus or producing a live birth.
>
> (40) "Conception" means the union of the sperm of a male individual and the ovum of a female individual.

Several amendments to the bill were added on the floor of the House. House Journal, May 11, 1977. The following amendment was added to the definition of "abortional act."

> "Abortional act" as defined herein does not include any act related to the use of intrauterine devices, contraception pills, nor to the use of any drug within 48 hours after sexual intercourse, except where the woman is twelve or more weeks pregnant.

Further amendments allow abortions to be performed in the case of deformed or genetically defective "fetal material," and in the case of rape or incest where the unborn child has not reached viability.

Thus the bill would generally prohibit acts committed upon a woman, whether she is pregnant or not, with the intent to cause the death or expulsion of a united sperm and ovum. Section 3 provides for those acts which are not within this prohibition. The second portion thereof deals with abortions performed before the viability of the unborn child, which are generally first and second trimester abortions. Such abortions may be legally performed under the bill only after a positive pregnancy test and on the basis of the best medical judgment of a physician that it is necessary under all attendant circumstances.

In Roe v. Wade, supra at 163, the Court set the following standard for first trimester abortions:

> . . . the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) [hereinafter cited as Planned Parenthood], the Court upheld informed consent and recordkeeping requirements. While both provisions were operable in the first trimester, the Court noted that they did not restrict the decision of the patient or

her physician regarding abortion and quoted the observation of the District Court that "the [consent] requirement in no way interposes the state or third parties in the decision-making process." Id. at 66. Furthermore, it was specifically pointed out that the recordkeeping requirement perhaps approached constitutionally permissible limits. Id. at 81.

The requirement of a positive pregnancy test has been suggested as posing an impermissible restriction on first trimester abortions; however, when a similar requirement imposed by a Pennsylvania statute was challenged it was upheld by a three judge district court. Planned Parenthood Association v. Fitzpatrick, 401 F.Supp. 554 (E.D. Pa. 1975).

We have been informed that currently utilized pregnancy tests operate by the measurement of the level of a placental hormone, the development of which varies with individual women. It is our understanding that these tests are not considered accurate until a time beginning approximately at the end of the first month of pregnancy and in no event are they considered infallible. Douglas & Stromme, Operative Obstetrics at 35-36 (3rd ed. 1976); Pritchard & MacDonald, Obstetrics at 208-11 (1976); Page & Villee, Human Reproduction at 234-35 (2nd ed. 1976); Gold, Gynecologic Endocrinology at 80 (2nd ed. 1975). Consequently, it has been suggested that the requirement of a positive pregnancy test could delay the exercise of the physician's best judgment and could serve to deny or delay the right to obtain an abortion at the earliest and safest time. This would be particularly the case with regard to women who have had incorrectly negative tests.

On the basis of the most direct authority available, i.e., the Fitzpatrick case, it appears the test requirement would be upheld; however, we caution that there is a substantial possibility , of which the Legislature should be aware, that the test requirement would be found unconstitutional or severely limited. If the nature of the tests is as has been explained to us and outlined above and if it is shown that the test requirement imposes a restriction on the right established by the Supreme Court in Roe of the woman and her physician to make the abortion decision during the first trimester free from interference from the State or serves effectively to deny or delay certain women their right to obtain an abortion at the earliest and safest time, then it is likely the Courts would find the

pregnancy test requirement to be unconstitutional under the Roe standard. Alternatively, a court might avoid any constitutional question by construing the pregnancy test provision merely to contemplate the professional judgment of the physician that the woman is pregnant rather than to require a positive laboratory test.

In Doe v. Bolton, 410 U.S. 179 (1973), the Court upheld a statute which, as modified by the District Court, provided that an abortion could be performed when it is "based upon [a physician's] best clinical judgment that an abortion is necessary." Id. at 202. The Court explained that the provision should be construed to allow judgment

> in the light of all factors - physical, emotional, psychological, familial, and the woman's age - relevant to the well being of the patient.

Id. at 192. The requirement of House Bill 1875 that an abortion be performed before viability only on the basis of the best medical judgment of a physician that it is necessary under all attendant circumstances would in our opinion be upheld by the Supreme Court as so construed. Consequently, the exception in section 3 with respect to non-viable unborn children would probably be held to be consistent with the guidelines of the Supreme Court with the possible exception of the requirement of a positive pregnancy test.

The first portion of section 3 deals with abortions performed upon a woman carrying a viable unborn child. As noted in Roe v. Wade, after viability the State may regulate abortions in order to safeguard the life of the unborn child and may proscribe abortions "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," Planned Parenthood, supra at 61. The provisions of this portion of section 3 would appear to constitute valid regulations in the furtherance of this recognized state interest, although the requirement of "grave impairment of the health of the woman" is more restrictive than the language of the Supreme Court.

This portion of section 3 becomes operative at viability, which is defined in section 2 as occurring at 22 weeks of gestation or at an earlier age established by the State Board of Health Resources. In Planned Parenthood of Missouri v. Danforth, supra at 64, the Court stated:

> . . . it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

(Emphasis added). The Court in Roe noted that viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Roe v. Wade, supra at 160. Under these decisions we believe that the Supreme Court would probably hold the definition of "viable" contained in House Bill 1875 to be impermissible to the extent that it establishes "viability . . . at a specific point in the gestation period." Planned Parenthood, supra; Hodgson v. Lawson, 542 F.2d 1350 (8th Cir. 1976). The remaining portion of the definition is merely "an unborn child who possesses the capacity to live outside its mother's womb upon premature birth. . . ." This portion of the definition would in our view be consistent with the opinion in Planned Parenthood; the Supreme Court would probably interpret the definition as one which is to be applied in individual cases under "the judgment of the responsible attending physician." Id. at 64. We respectfully refer you to the definition of viability in the Planned Parenthood case opinion for a discussion of how the Missouri Legislature successfully dealt with this definitional problem in a constitutional manner.

Section 6 of House Bill 1875 also provides for regulation of abortional acts to be performed after the 20th week of gestation or upon a woman carrying a viable child. These provisions basically require efforts to preserve the life of the unborn child. A similar "standard of care" provision was dealt with in Planned Parenthood, supra at 81-84. The Court held the regulations to be unconstitutional because they were not limited to the period after viability. See also Hodgson v. Lawson, supra. Since section 6 becomes operative after the 20th week of gestation, rather than solely after viability as determined by the physician, it would probably be held constitutionally impermissible to the extent it applies before such viability as determined by the physician.

Section 7 of House Bill 1875 provides for the reporting of procedures resulting in abortions. A similar recordkeeping and reporting requirement was upheld in Planned Parenthood, supra at 79-81, and in our opinion section 7 is constitutional.

Section 8 constitutes a legislative finding that saline amniocentesis, a method of abortion, "is seriously deleterious to maternal health." Section 9(a) provides in part:

> No person shall employ the method or technique for performing an abortional act known as saline amniocentesis in performing an abortional act after the first twelve weeks of pregnancy where a safer method or technique is generally available.

In Planned Parenthood the Court invalidated a prohibition of saline injections. The Court offered two reasons for the statutes' invalidity. The first was that the prohibition did not extend to "techniques that are many times more likely to result in maternal death." Planned Parenthood, supra at 78. The second was that the prostaglandin technique was unavailable, and thus, most second trimester abortions were performed by saline injection. Section 9 does not purport to deal with the first objection; methods more dangerous to the life of the woman are not prohibited. The proviso regarding the general availability of a safer method would appear to satisfy the Court's second objection to the prohibition. However, we caution that this proviso creates problems of vagueness.

House Bill 1875 contains no definition of the terms "safer" or "generally available." The term "safer" is subject to several constructions. It could mean a lower mortality rate or a lower complication rate. In Planned Parenthood the Court was apparently aware of this ambiguity when it stated "safer, with respect to maternal mortality. . . ." Planned Parenthood, supra at 78. Furthermore, the term "generally available" could have any number of meanings. Thus, we caution that the Supreme Court could hold section 9 unconstitutional due to vagueness.

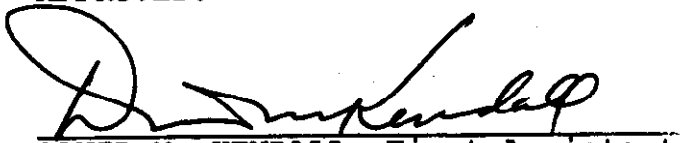
We have sought to apply the applicable U.S. Supreme Court cases only to the provisions of the bill which have been suggested as posing possible constitutional problems.

Very truly yours,

John L. Hill

JOHN L. HILL
Attorney General of Texas

APPROVED:



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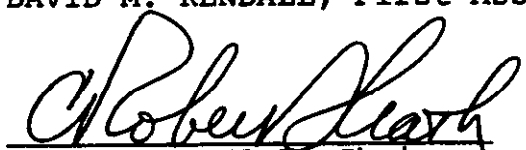

C. ROBERT HEATH, Chairman
Opinion Committee

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